

United States District Court
Western District of Texas
San Antonio Division

John S. Malek
Plaintiff,

v.

United States of America,¹
Defendant.

No. SA-21-CV-00073

Notice of Removal and Substitution and Application for Order Thereon

Defendant United States of America files this Notice of Removal and Substitution and Application for Order Thereon, pursuant to the provisions of 28 U.S.C. § 2679(d)(2) and 28 U.S.C. § 1442, removing the above-entitled action now pending as Cause No. C2020-2152D in the 433rd Judicial District Court, Comal County, Texas.

On December 31, 2020, an action was filed as Cause No. C2020-2152D in the 433rd Judicial District Court, Comal County, Texas, entitled John S. Malek, Plaintiff, vs. Lauryn Deering, Kara Iskenderian, and Morgan Hicks, Defendants. A copy of Plaintiff's Original Petition and all pleadings are attached hereto as **Exhibit 1**. The United States has not been properly served with the Citation or Petition pursuant to Federal Rule of Civil Procedure 4(i) and cannot waive service. Trial has not been set or held.

Attached hereto as **Exhibit 2** is a certification that Defendants Lauryn Deering, Kara Iskenderian, and Morgan Hicks were acting within the scope of their federal employment, at the time of the alleged incidents giving rise to the petition. Because Plaintiff alleges he was injured by federal employees acting within the scope of their employment on behalf of the United States Air Force, Plaintiff must proceed with this action, if at all, under the Federal Tort Claims Act ("FTCA"). The United States is the only proper defendant in an FTCA action. *Galvin v. Occupational Safety & Health Admin.*, 860 F.2d 181, 183 (5th Cir. 1988). Substitution is required

¹ Substituted for Defendants Lauryn Deering, Kara Iskenderian, and Morgan Hicks by operation of law.

under the FTCA. *Mitchell v. Carlson*, 896 F.2d 128, 130 (5th Cir. 1990) (“[O]nce the case is in federal court, the federal district court is required to substitute the United States as defendant in place of the federal employee, and the case proceeds ‘in the same manner as any action against the United States’, i.e., as a claim under the Federal Tort Claims Act.”). Therefore, the United States applies for an Order from the Court dismissing Lauryn Deering, Kara Iskenderian, and Morgan Hicks as Defendants and substituting the United States in their place memorializing the substitution that has occurred.

Pursuant to the provisions of 28 U.S.C. § 1446(d), a Notice of Filing Notice of Removal will be filed with the 433rd Judicial District Court, Comal County, Texas, a true and correct copy of which is attached hereto as **Exhibit 3**.

Pursuant to Local Court Rule CV-3(a), a JS 44, Civil Cover Sheet is attached hereto as **Exhibit 4**.

As this federal case is being initiated via removal, a Supplement to JS 44 is attached hereto as **Exhibit 5**.

The United States of America provides this Notice that the action now pending in the 433rd Judicial District Court, Comal County, Texas against Defendants Lauryn Deering, Kara Iskenderian, and Morgan Hicks is timely removed to this Court.

Respectfully submitted,

Gregg N. Sofer
United States Attorney

By: /s/ Matthew Mueller

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Certificate of Service

I certify that on January 29, 2021, I electronically filed this document with the Clerk of Court using the CM/ECF system.

☒ I also certify that I have mailed this document by United States Postal Service to the following:

Casey S. Erick
Cowles & Thompson, PC
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Dallas, Texas 75202
cerick@cowlesthompson.com

/s/ Matthew Mueller

Matthew Mueller
Assistant United States Attorney